

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRYAN DAVID RANGE, : CIVIL ACTION
Plaintiff, :
vs. :
JEFFREY A. ROSEN, Acting Attorney : NO. 20-3488
General of the United States, et al. :
Defendants. :

PHILADELPHIA, PA
JULY 1, 2021

BEFORE: THE HONORABLE GENE E.K. PRATTER, J.

HEARING ON MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

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- And -

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(Transcript produced by machine shorthand via C.A.T.)

1 (Deputy Clerk opened court)

2 THE COURT: Hello, everybody. Please take your
3 seats. Make yourselves comfortable, please.

4 This is the time set aside for oral argument in the
5 case of Range versus Barr which is docketed at 20-3488 on the
6 Court's docket.

7 Let's take attendance first off.

8 MR. GURA: Good morning, Your Honor. Alan Gura for
9 the plaintiff.

10 MR. GOTTLIEB: Good morning, Your Honor. Michael
11 Gottlieb also for the plaintiff.

12 MR. GURA: And I should say we're joined here by our
13 client, Mr. Range.

14 THE PLAINTIFF: Hi.

15 THE COURT: Hi, Mr. Range, how are you doing?

16 THE PLAINTIFF: All right.

17 THE COURT: How was the drive or the train or
18 however you guys came in?

19 MR. GOTTLIEB: My drive was horrible. Traffic,
20 traffic, traffic just from Norristown.

21 THE COURT: Welcome to our world.

22 MR. GURA: The train was fine with me. Thanks, Your
23 Honor.

24 THE COURT: Okay. Well, that's good.

25 MR. KOOB: Good morning, Your Honor. Paul Koob for

1 the Federal Defendants.

2 MR. GILL: Good morning, Your Honor. Eric Gill.

3 THE COURT: Mr. Gill, I haven't seen you in a while.
4 It's nice to see you again.

5 MR. GILL: Very nice to see you.

6 THE COURT: Did you bring up to date your interns
7 from the U.S. Attorney's Office about this case?

8 MR. GILL: They are here.

9 THE COURT: Well, I know they're here.

10 MR. GILL: They're interested in the argument.

11 THE COURT: Okay. Well, I think although normally I
12 run into these cases, just to tell everybody, we have a number
13 of interns here from the U.S. Attorney's Office who are
14 interested in the argument just generally to see what goes on
15 in court and so I'm going to ask that as part of the
16 presentations that there is a little bit more than I would
17 normally need of a background description of the case and the
18 posture of it as well as the principal legal issues and then
19 we can get into discussing the argument and my questions if
20 that doesn't upset your apple carts, gentlemen.

21 MR. GURA: That's okay, Your Honor.

22 THE COURT: Oh, good, glad to hear it.

23 All right, we have an issue that's very interesting,
24 very timely in some respects, and the motion for summary
25 judgment is -- I guess they're cross motions so it doesn't

1 matter to me who goes first, but whoever goes first has the
2 obligation to set the stage in a more elaborate way than would
3 be typical.

4 Do you want to toss a coin? What? It doesn't
5 matter to me.

6 MR. GURA: I can go first or you can go first. I
7 don't care.

8 MR. KOOB: I'll defer to you then.

9 MR. GURA: All right. Well, I can start, Your
10 Honor, as long as I get a reply.

11 THE COURT: Yes.

12 MR. GURA: Good morning, Your Honor. Alan Gura for
13 the plaintiff, Bryan Range.

14 Section 922(g) is called the felon in possession law
15 by many courts and lay people, but actually the statute itself
16 does not use the term felony.

17 THE COURT: Neither do the Court's instructions to
18 the juries when we have that case.

19 MR. GURA: That's good to know. The statute says
20 that anyone who's convicted by a crime punishable by over a
21 year in jail or a state misdemeanor punishable by over two
22 years in jail is forbidden from having firearms forever under
23 all circumstances for life. The statute is quite broad in its
24 application. And in this case, there is no challenge to
25 whether or not it's facially valid. There have been a number

1 of cases by people who are charged with a violation of this
2 prohibition and they have all kinds of arguments that the
3 statute is overbroad or it violates the Second Amendment on
4 its face in some capacity, but those types of arguments are
5 not at issue here in the case. Rather, the issue here is
6 whether or not the statute can be applied, it's an as-applied
7 challenge to Mr. Bryan Range based on his personal
8 circumstances and based on the facts of his offense and his
9 life thereafter.

10 The Third Circuit en banc in a case called *Binderup*
11 a number of years ago in 2016 accepted the notion that
12 as-applied challenges to Section 922(g)(1) are permissible
13 after all. In *Heller*, the Supreme Court said that felon bans
14 are presumptively lawful, and as the Third Circuit reasoned,
15 presumptions in law are typically capable of being overcome
16 based on some circumstances and if we didn't allow for
17 as-applied challenges, we would have a funny situation where
18 you would have a fundamental right to do something and then
19 Congress has complete authority to define who has the right to
20 access this fundamental right and you can't have a
21 constitutional right whose limits are defined by the Congress.
22 The Constitution acts as a limitation on Congress' power and
23 so Congress can --

24 THE COURT: *Heller* is 2008?

25 MR. GURA: That's correct.

1 THE COURT: And Binderup is eight years later?

2 MR. GURA: Correct. Correct. So there must be some
3 way for a person to come to court and say, As applied to me,
4 this violates my rights.

5 The Court in Binderup was split as to exactly what
6 makes for an as-applied challenge, but over future cases, it's
7 come to be accepted law in this circuit that Judge Ambro's
8 plurality opinion is the controlling law of the Third Circuit.

9 THE COURT: Have you ever tried to sketch out
10 Binderup --

11 MR. GURA: Yes.

12 THE COURT: -- in the opinions? It's a mess.

13 MR. GURA: Yes, it's highly fractured and there are
14 some judges who didn't write separately, but their opinions
15 are noted in footnotes of other judges and so it is quite
16 complicated, but the one thing we do know for sure is that
17 Judge Ambro's opinion, for better or worse, is the controlling
18 law and by arguing today under Judge Ambro's controlling
19 opinion, we don't mean to give up our claim preserved in the
20 papers that should some other court wish to change this view,
21 we believe that Judge Hardiman's concurring opinion actually
22 sets forth the better approach to the Second Amendment.

23 THE COURT: Judge Ambro was joined by two of his
24 colleagues.

25 MR. GURA: That's right.

1 THE COURT: Judge Hardiman wrote and was joined by
2 four of his colleagues concurring in the judgment.

3 MR. GURA: That's correct.

4 THE COURT: And then Judge Fuentes contributed an
5 opinion that was concurring and dissenting and he has six
6 colleagues.

7 MR. GURA: That's correct, where Judge Fuentes --

8 THE COURT: That's more than there were on the Court
9 at the time.

10 MR. GURA: That's correct. We had in both cases --
11 there was consolidated cases and actually I argued that case
12 three times because it was argued before two panels and then
13 the Court decided they needed to rehear it en banc.

14 THE COURT: It must have been quite frustrating.

15 MR. GURA: No, it was great. We get to do this
16 three times and by the third time, you know, we sort of
17 figured it out.

18 But, in any event, where Judge Fuentes joined with
19 Judge Ambro was on the idea that the two-step process of
20 Marzzarella was going to be governing. Where they departed is
21 that Judge Fuentes' dissent offered that anything that fits
22 the definition of Section 922(g)(1) is going to be lawful and
23 end the challenge in step one and Judge Ambro felt that that
24 was not the case. And so there were eight judges, Judge
25 Ambro's contingents plus Judge Hardiman's contingents who

1 believed that the challenges should prevail, but then those
2 eight split three and five as to what the theory would be.
3 Judge Ambro applied the two-step methodology from Marzzarella
4 and offered a variety of factors at the first step as to what
5 makes the crime serious meaning that it is okay for Congress
6 to prohibit a person with that conviction from having guns and
7 then if the challenger meets step one, the Government then has
8 a burden of step two to show that prohibiting this individual
9 from having firearms satisfies --

10 THE COURT: Okay, but just to keep track of all the
11 steps we have to go through, Binderup has four steps.

12 MR. GURA: Correct.

13 THE COURT: And Marzzarella has two steps.

14 MR. GURA: No, Your Honor. Binderup and Marzzarella
15 both have a two-step process in terms of whether or not the --
16 I'm doing this in part per your instructions, Your
17 Honor's instructions for the benefit of the folks in the
18 audience, but the first step in Binderup is divided into four
19 factors and then in Holloway, the Third Circuit added a fifth
20 factor. And so if, figuring out these four, now five factors,
21 the challenger carries his or her burden to show that the
22 regulation impacts something that's within the ambit of the
23 Second Amendment, then the burden shifts to Marzzarella step
24 two where the Government has the burden.

25 THE COURT: Okay, the Marzzarella step one is the

1 five Binderup factors.

2 MR. GURA: Correct.

3 THE COURT: The first being --

4 MR. GURA: Classification.

5 THE COURT: Okay, is it a misdemeanor or felony.

6 MR. GURA: Correct.

7 THE COURT: The second is did it involve violence or
8 attempted violence.

9 MR. GURA: Right.

10 THE COURT: Third, what was the sentence imposed.

11 Fourth is then this consensus, cross-jurisdictional
12 consensus concept which we're going to come back to in a
13 minute.

14 MR. GURA: Sure.

15 THE COURT: And then the fifth, the Holloway, I
16 think, brought us the fifth and that is the potential for
17 harm.

18 MR. GURA: That's right.

19 THE COURT: Right?

20 MR. GURA: The dangerousness of the actual offense.

21 THE COURT: Okay. And then the Marzzarella step two
22 would be --

23 MR. GURA: The Government would have to carry a
24 burden of showing that -- an intermediate scrutiny burden of
25 showing that applying the law to the challenger advances

1 public safety without -- satisfies an important interest in
2 public safety without going too far in terms of burdening the
3 challenger's rights.

4 With respect to -- I guess I should start --

5 THE COURT: Now, why don't you --

6 MR. GURA: Sure. Sure.

7 THE COURT: -- for the rule of completeness here --

8 MR. GURA: Okay.

9 THE COURT: -- talk about Mr. Range.

10 MR. GURA: Sure. So let's talk about Mr. Range.

11 Mr. Range is here because, I guess it's 30 years ago now, it
12 was in 1995 he was convicted of one count of misdemeanor --
13 first degree misdemeanor in Pennsylvania of not revealing
14 fully his income in applying for food stamp assistance for his
15 family. At the time, the Ranges had three small children.
16 Mr. Range's wife was taking care of the kids, Mr. Range was
17 working, mowing lawns, not making a whole lot of money. The
18 couple was struggling and they applied for food stamp
19 assistance and in the application to the Welfare Office, the
20 lawn mowing income was not disclosed. This resulted in
21 additional benefits being given and this went on for a period
22 of time. By the time that the state discovered this, the
23 excess benefits had come to total just under \$2,500 over the
24 course of, I believe it was, about a year and so he was
25 charged with -- both, actually, Mr. Range and his wife were

1 charged with food stamp fraud essentially for not disclosing
2 fully the income. Mr. Range at the time -- this was a
3 misdemeanor. This was a Class 1 misdemeanor in Pennsylvania
4 punishable by up to five years in jail. Therefore, it
5 triggers the application of 922(g)(1). I should note that the
6 M1 classification in Pennsylvania that's at issue here is
7 exactly the classification that was at issue in Binderup. Mr.
8 Binderup's violation was also an M1, Misdemeanor 1.

9 THE COURT: And in Binderup, there really wasn't an
10 overwhelming totting up of the factors in favor of the
11 Government and yet the outcome was to uphold the denial of the
12 right to possess a firearm, was it not?

13 MR. GURA: No, Binderup prevailed.

14 THE COURT: But the collection of factors really was
15 so out of balance. I mean it was not a tough contest there,
16 was it?

17 MR. GURA: I would say it was not. It was an '87
18 case, so, you know, who knows. The judges may have thought it
19 was a closer call and certainly generated a lot of texts, but
20 as Binderup's counsel, I would say to me, it was a -- it was
21 not a close call, yes, but the very first factor was
22 classification. The Court stressed there and has subsequently
23 told us in other cases that classification is really the most
24 important factor. There is no litmus test, there is no one
25 factor that solves it all and the Court, the Third Circuit has

1 indicated time and again that it is -- it is a balancing test,
2 it's an art, if you will, but generally dispositive is the
3 word that the Third Circuit most recently used when referring
4 to classification as in Folahtar not long ago. The Third
5 Circuit told us that they assigned classification primary
6 weight, and the reason the classification is so important is
7 because the courts like to defer to the legislature's
8 expertise and experience in reflecting the public's values as
9 to what is serious and what is not.

10 THE COURT: And yet it would be your position I'm
11 surmising that Binderup does not require the person
12 challenging the application of 922(g) to satisfy all the
13 factors.

14 MR. GURA: That's correct.

15 THE COURT: Okay.

16 MR. GURA: That's correct. And the Courts have made
17 that clear because there is no single dispositive factor. So
18 that means that you can -- you can lose a factor and still
19 carry the day. There's no need to run an entire gamut,
20 although here I must say we have at least four of them I think
21 fairly clearly. I think we have a dispute, a legitimate
22 dispute on cross-jurisdictional consensus, which I'll get to,
23 but classification is obvious, it's a misdemeanor. We know
24 that from looking at the classification at the time and the
25 reason we look to classification is because it's the

1 legislature's view. We may all have ideas about what's
2 serious and what's not, but this is really a legislative
3 judgment as to how society treats this particular crime and
4 oftentimes, you know, if you have a felon case, the person in
5 my position would say, Well, the classification is, you know,
6 not that important, the felon can still prove that he or she
7 is nonviolent, and the Government would say, Well, felon is a
8 very important --

9 THE COURT: But do you not think that the label is
10 less important than the consequence? I mean here this is,
11 whatever you call it, you know, call it a tea party, but if at
12 the end of the day or the end of the party, you're at risk for
13 being sent to prison for five years, isn't that what's
14 important as opposed to the label?

15 MR. GURA: Okay, I believe that the label would be
16 somewhat more important because even within those five years,
17 there's a great deal of leeway. Five years, very few
18 misdemeanors in Pennsylvania I think would get all full five
19 years. There's an assignment by the legislature to the bench
20 of having some flexibility as to how to treat people, but the
21 sentence actually received I think is maybe more telling as
22 far as, you know, what happened in the particular
23 circumstance. However, that may be my opinion. The Third
24 Circuit's opinion and they've told us this several times is
25 that the most important factor is the classification itself.

1 It's generally dispositive. They give it primary weight.

2 Those are their words.

3 THE COURT: That's because it's easier. Maybe not
4 the cause is easier, but it is certainly easier.

5 MR. GURA: It is easier. It is easier. I suppose
6 some people might say it's because it's easier, they like to
7 give it primary weight. I think the Third Circuit would say
8 no, because it actually reflects the judgment. In any event,
9 what we know is for a fact that they've called it generally
10 dispositive and they give it primary weight.

11 So our position is if it's important for a felon to
12 challenge, like Ms. Folahtar, to say, Oh, that's it, you're a
13 felon, that's super important, well, it has to be important in
14 all cases. It's not just important where the person is
15 classified as a felon, it should be important where the
16 person's also classified as not a felon. In any event, that's
17 the first factor.

18 The second factor, there's really no dispute here.
19 This was not a violent crime. There's no violence at all
20 involved in this type of offense.

21 Third, the sentence actually received. What was the
22 sentence? Well, Mr. Range walked out of court. He was -- he
23 was told, Look, just plead guilty to this and you get a fine
24 and make restitution and, you know, a little bit of probation
25 and that's it and he said deal and that was that. That

1 reflected the prosecution's view of the case in making him
2 that offer and it reflected the Court's view in taking it.
3 The Court, you know, didn't have to accept that, it could have
4 imposed a different sentence, but it did accept -- it did
5 approve of the prosecution's offer. So the sentence actually
6 received was not a single day in jail. Those are the words in
7 *Binderup*. So we know that factor weighs in.

8 THE COURT: Do you accept the notion that it is in
9 this case Mr. Range's burden of proof on each of the factors?

10 MR. GURA: Well, yes, it is -- it is Mr.
11 Range's burden to prove step one. So he has to prove that the
12 various five factors, however they might shake out, yield
13 showing that the crime is not considered "serious" given these
14 five factors. So, yes, that much is our burden and I think
15 we've met it. We've got four of those factors. I should get
16 -- the fourth factor we have, of course, is dangerousness.

17 Holloway was a misdemeanor case, but that was a
18 very -- a very dangerous misdemeanor. It was a repeat offense
19 DUI with an extraordinarily high BAC level. It was a type of
20 offense that even though it was classified as a misdemeanor,
21 unlike *Binderup* and unlike here, there was a mandatory jail
22 sentence. The legislature reflected its view of the severity
23 not just by saying, Look, you have a range of a few years,
24 they actually mandated a jail sentence which, of course, Mr.
25 Holloway received so he actually did go to prison. This is

1 not a dangerous case at all. Whatever else you might think of
2 the offense here, it did not involve the risk of harm to
3 anybody.

4 THE COURT: Well, doesn't that depend upon how one
5 defines harm? I mean whenever there is a theft of assets for
6 which the entire country -- on which they are dependent, it
7 can be serious.

8 MR. GURA: I believe here, two points, Your Honor.

9 First of all, I believe Holloway focused on
10 dangerousness, and while theft and fraud can be harmful to the
11 public fits, I don't know that it's something that -- you
12 know, usually we separate between money --

13 THE COURT: Well, I understand what you're saying --

14 MR. GURA: And the second --

15 THE COURT: -- but I don't want to minimize --

16 MR. GURA: Sure.

17 THE COURT: -- the notion that whenever someone lies
18 to the Government, we depend -- we, the commonwealth, not
19 Pennsylvania, but the commonwheel depend on truthfulness.

20 MR. GURA: That's correct.

21 THE COURT: Otherwise, the whole thing collapses,
22 right?

23 MR. GURA: That is correct, Your Honor, and this
24 also brings me to my next point which is it's the legislature
25 that decides how much damage is serious because as the

1 Government offered in their own proposed Fact Number 6 which,
2 of course, we admitted to, the Government notes helpfully that
3 in the very states that criminalize welfare fraud, there is
4 typically a distinction, a dollar-level distinction, that the
5 legislature sets as to what is a misdemeanor and what is a
6 felony. And so the legislature makes that judgment, not the
7 judge, not, you know, other people ten years later. They tell
8 you it's 100 bucks, it's 500, it's 2,000, whatever. They
9 decide. And this actually comports with the well-understood
10 concept that there's a difference between stealing a little
11 bit of money and stealing a lot of it. It goes back to the
12 13th century.

13 THE COURT: Yes, well, I understand it and I
14 understand that you teed this up straight out of, you know,
15 Victor Hugo. I mean this is a Jean Valjean story, you know,
16 par excellence, I get that, but I think the pure legal
17 question really requires me to only put that, Mr.
18 Range's story, in the context of one of the factors. This is
19 not a novel. It's not designed to create a legal system based
20 upon a particular story.

21 MR. GURA: The reason, Your Honor, we put some
22 emphasis on the novelization, if you will, is because that's
23 mostly in response to the Government's presentation of the
24 case, which I'm sure they'll get to make, but the Government
25 had a very strong theme in its papers which is theft is theft

1 and it's always serious and they make this claim that, you
2 know, anything that's fraudulent, anything that's stealing is
3 per se a serious offense and, therefore, fails in step one.
4 That is simply not compatible with deferring to classification
5 where the legislature tells us how much theft is serious and
6 how much theft is not serious. And so, yes, we can say that
7 the amount of money is a point of distinction. The character
8 of the crime we're talking about, public welfare offense, as
9 opposed to, I don't know, defrauding Enron investors or world
10 commerce or Bernie Madoff or let's talk about the tax code
11 because Folajtar was a tax case. Ms. Folajtar was convicted
12 of making a false statement on a tax return, which is a
13 felony, but if you look further down the tax code, we see that
14 there's no distinction either of what she was convicted of or
15 in other tax provisions as to dollar amount. There is,
16 however, a distinction between felony tax evasion and a
17 misdemeanor wilfully not paying a tax, which is a different
18 section, but whether you lie about \$0.50 or \$500 or a million
19 dollars, it's still going to be classified according to
20 whether you evaded or whether you simply wilfully didn't pay
21 or whether they decided to charge you for making a false
22 statement. So the character of the offense also relates to
23 the type of property that was taken or the type of -- or the
24 method that was used. So, for example, shoplifters stealing a
25 lollipop would be different than an armed robber stealing the

1 same lollipop because the method there is more serious and the
2 legislature is going to express its judgment on that. So here
3 we have a public welfare offense that is below the limit that
4 the legislature deemed to be felonious and so these
5 distinctions are all over the law of theft and fraud. They're
6 made by the legislature, they're not made by judges, they're
7 not made by lawyers, and we have to defer to those. So I
8 would say with respect to the, you know, Jean Valjean on that
9 is that it is simply not true that the fraudulent nature of
10 the crime or the theft nature of the crime is a per se
11 invalidation of a --

12 THE COURT: Well, I certainly understand the
13 persuasiveness of an argument that says a legal system will
14 only be respected if it is tailored to meet what's really
15 going on in a particular circumstance. You don't want to --
16 an overreaction is not a system that is going to make it the
17 long haul. I get that. I totally get that.

18 Let's talk, though, about what I think is the
19 hardest part of this argument for Mr. Range -- we talk about
20 you, but we're really talking to the lawyers -- and that is to
21 sustain the burden of proving that there is no consent.

22 MR. GURA: Okay, Your Honor's correct that, and I
23 think we've said in our papers, this is the one factor where
24 the Government has the strongest point. You know, it is true
25 that, you know, in -- you know, we've had going back and forth

1 the speech about how we count this state's law or that state's
2 law, but we're generally in agreement the numbers are roughly
3 the same. The Government said that in its last brief and we
4 agree with that that there are -- we would count 38, they
5 would count 39 states where this type of conduct today would
6 be considered a felony. We would argue, however, that to have
7 an apples-to-apples comparison, it's better to look at laws
8 that target specifically public welfare offenses. The broad
9 generalized theft statutes do a lot of work. They cover
10 everything from this type of crime all the way up to, you
11 know, Bernie Medoff level and we would contend that when a
12 legislature sits and thinks about, you know, how do we deal
13 with people who don't report all their income in applying for
14 food stamps, we look at that judgment specifically. Even
15 within that judgment, we're still looking at, I believe, 29
16 states if you count Massachusetts, we've had a dispute about
17 that, that specify that Range's conduct is felony welfare
18 fraud. That is a majority. I don't think that it's a
19 consensus view. It's not --

20 THE COURT: That, in fact, is my next question which
21 is how elusive is the concept of what does consensus mean? I
22 mean this is not a 51/49 issue, is it? I mean consensus is,
23 you know, practically a tenet of a church. The Quakers, you
24 know, consent to developing a consensus. How much grumbling
25 when you leave the room after somebody declares there's been a

1 consensus means there's no consensus which is a question of
2 what does consensus mean.

3 MR. GURA: We would submit that when you have
4 slightly over 20 percent of the jurisdictions that would label
5 it a misdemeanor, then that's enough grumbling I would say,
6 but, you know, obviously we understand the laws are what they
7 are. If the Court were to determine that the Government is
8 correct and we have not established the cross-jurisdictional
9 consensus, then I would submit that we still have the other
10 four factors and this is not enough to defeat the primary
11 weight that is, you know, generally --

12 THE COURT: You're trying to wiggle away from me on
13 the issue of consensus.

14 MR. GURA: I'm conceding that this is the hardest
15 factor. I believe that it is what it is. I don't think
16 there's a consensus because we have enough states that would
17 treat this as a misdemeanor. We also, let's face it, there
18 are -- there's a real question as to whether or not -- you
19 know, we don't know what's going on in the minds of the
20 legislatures in 50 states, but we can surmise that when the
21 legislature tells the courts, you know, punish theft and fraud
22 here, here's all the theft and fraud, here's one statute, deal
23 with it, that there's a certain level of trust given the
24 judges to sort out the Ranges from the Madoffs. And, you
25 know, the legislatures that try to be more granular in their

1 classification of these things, there it's a little bit
2 closer. Overall, the picture is about, you know, a little
3 over 20 percent of the country would have it as a misdemeanor
4 and I'm not sure that that makes for consensus --

5 THE COURT: Well, the issue I'm focused on here is
6 that the use of the word consensus is really not consistent
7 with the idea that we're going to count noses and majority
8 wins. So these are in terms of the way we order our
9 conduct -- we, the society. Consensus implicates something
10 very different than a formal vote.

11 How does that work in this setting do you think?

12 MR. GURA: I agree with Your Honor that consensus is
13 not a nose counting, it's not a formal vote. Unfortunately,
14 the only clues that we can have as to consensus is to count
15 these very statutes. If there's another way, I have not
16 interviewed the various legislatures on their, you know,
17 current opinions on this, but I would say that we can -- we
18 can look to see broadly how this is treated and there is no
19 consensus. There's no overwhelming view that, oh, yes, there
20 might be but one strange outlier state that doesn't think this
21 is a problem; you know, 49 states, you know, make it a felony.
22 We're not there. And more than that, we're talking about an
23 area of law which is inherently, I mean, if there was some
24 other type of crime like DUI, which is a specific act that's
25 punished everywhere, and you can -- it's much easier to count

1 that, but when you're talking about the category of theft or
2 fraud, it's inherently subject to all these different --
3 different hues as to whether or not, you know, the methods,
4 the class of property, the dollar amount, and these things are
5 fluid and they're judgment calls, and I think in this
6 particular area of law especially, it's hard to find
7 consensus. It might be easier to find consensus in perhaps a
8 different class of crime.

9 THE COURT: Well, and then what do you do with the
10 idea that the consensus might actually shift over time?

11 MR. GURA: We are stuck in 1995 because, otherwise,
12 as I think it was Judge McHugh in this court in the Irving
13 case said, "There's no judicial time travel," and that is
14 correct because if you think about it, if we're going to
15 disarm people under 922(g) not based upon what they were
16 convicted -- you know, how their crime was treated 30 years
17 ago, but how it's treated today, there would be an
18 unbelievable amount of uncertainty as to whether or how this
19 crime applies. I think we have to take a snapshot in time,
20 say, okay, this is what society thought of what you did back
21 in whenever it was.

22 THE COURT: Well, then it would be subject to the
23 executive branch deciding what is a worthy focus to prosecute
24 as well which, by the way, happens all the time.

25 MR. GURA: That is always the case and I should

1 mention in this case in particular, and this is something I
2 believe we noted in our papers, Mr. Range was not represented.
3 You know, we suspect if he had a lawyer, diversion might have
4 probably been on the table. This is a type of crime for, you
5 know, that a lot of people, you know, have a diversionary
6 option. Some states, I believe it was Georgia, actually build
7 it into the statute and that's why we classify it as, you
8 know, not a felony because if you read the case, it's a
9 misdemeanor or it's actually dismissed after a period of time.

10 So, no, we -- we think that we're --

11 THE COURT: Well, as I understand it, you argue that
12 this consequence was not explained to Mr. Range at the time.

13 MR. GURA: That is true. The consequence was not
14 explained, but more the point, we're not -- we're not making a
15 Padilla challenge in this case, but more the point, this is
16 where a lawyer could have made a difference in there being a
17 conviction at all and, in any event, he was convicted, it was
18 classified as a misdemeanor, this is how the society treated
19 it at the time, and we can't go back in time and tell people,
20 well, yes, 30 years ago, what you committed was an infraction,
21 it wasn't even a crime, but today it's a felony so let's turn
22 in those guns. I mean we don't do that.

23 THE COURT: No, I understand that because that issue
24 goes both ways.

25 MR. GURA: Sure.

1 THE COURT: Why don't you talk about now the step
2 two which I suppose you will argue is the Government's burden
3 to deal with.

4 MR. GURA: It is and the Government's completely
5 failed to meet it. And a couple of points. So, step two,
6 obviously not our burden. More the point, you know, we did
7 ask the Government some questions in discovery about this and
8 the Government's position throughout discovery was that
9 dangerousness was irrelevant and they put this in their
10 objections to our discovery that, you know, we don't have to
11 tell you because it doesn't relate to any defense whether or
12 not, you know, he's dangerous.

13 THE COURT: Well, this is in the context of the
14 issue of heightened scrutiny.

15 MR. GURA: That's correct. The only public interest
16 here -- we're talking about firearms. The only public
17 interest here would be public safety. There isn't some other
18 public interest that's been identified by the Courts or
19 suggested by the Government. And the evidence for public
20 safety rationale here is surprisingly the same evidence that
21 the Third Circuit rejected flat out in *Binderup* and that the
22 district court rejected in *Binderup*. These are the very same
23 studies that the Third Circuit called off point. I think that
24 the Government should have retired those studies and perhaps
25 found some other ones and it's easy to see why they're off

1 point. These are studies of hardened criminals, people who
2 are coming out of state prison and when these studies were
3 offered in *Binderup*, the Third Circuit said, Wait a minute,
4 neither of these gentlemen here, Mr. *Binderup* or Mr. *Suarez*,
5 had ever been in prison and it's not the same cohort. More to
6 the point, these studies amplify the impact of the cohort that
7 has an unbelievably lawless background, a lot of violent
8 crimes, firearms offenses, dangerous incidents. There's also
9 an age issue. One of the studies cuts off looking at people
10 once they reach age 50, and Mr. *Range* is over 50 right now,
11 and, of course, they also -- they went to a new study, cut off
12 a 15-year follow-through for recidivism. We've been way past
13 15 years here, and as the Third Circuit recognized in
14 *Binderup*, the longer you go out in time and the person hasn't
15 recidivated, the less time, you know, the less odds are that
16 there would be recidivism. But recidivism also of what?
17 Because is the question whether or not Mr. *Range* will reoffend
18 with another welfare offense or is the question whether or not
19 because 30 years ago he had a welfare offense, that tomorrow
20 he's going to start shooting people? I mean that's just not
21 logical. It doesn't make any coherent sense. So -- and the
22 Government also mixes up their step two argument.

23 THE COURT: What about the other study? I mean I
24 probably will revisit here with your friends from the
25 Government on the issue about the candor of disclosing the two

1 tests that have been rejected by Binderup, but there are some
2 studies that they now brought to my attention that have not
3 specifically been rejected.

4 MR. GURA: Oh, I believe that one of those studies
5 was essentially also -- while there was one -- there were two
6 studies, I believe, that were rejected and one of them that
7 was similar to one that was and it was a study of exiting
8 prison inmates and so it has the same flaw, but with respect
9 to -- one of the studies, of course, was incredible. I mean
10 Judge Gardner dug into this. I believe this is the Wright
11 study in here, I mean, quoting from the papers. This is Judge
12 Gardner. Finally, perhaps, most significantly, the authors of
13 that study stated that, and he's quoting the Wright study of
14 '89, In terms of some potentially important differences in
15 risk for later criminal activity, this study was too small to
16 determine whether the differences occurred by chance. That's
17 not enough to carry a heightened scrutiny burden and so I
18 submit, Your Honor, that there is always an interesting
19 question in these cases about step one and whether we have
20 enough of the five factors and some combinations to make a
21 step one case, but then at step two, the Government's case, it
22 simply doesn't fit. It falls apart.

23 THE COURT: Would you like a chance to pop up again
24 after I hear from the Government?

25 MR. GURA: Sure. I'll appreciate that. Thanks.

1 THE COURT: Okay, that's fine. So which of you
2 gentlemen would like to respond or tell me what the
3 Government's view is on all of this?

4 MR. KOOB: I will be speaking, Your Honor.

5 THE COURT: Go ahead.

6 MR. KOOB: Good morning, Your Honor. Paul Koob on
7 behalf of the Federal Defendants.

8 Bryan David Range pleaded guilty to welfare fraud,
9 stealing from its reserves for Pennsylvania's neediest
10 citizens. At the time of his conviction, welfare fraud, as we
11 heard, was a first degree misdemeanor punishable by up to 5
12 years in prison. Range claims that 18 U.S.C. 922(g)(1) is
13 unconstitutional as applied to him, but the Government's
14 summary judgment brief should be granted because his welfare
15 fraud conviction is a serious crime reflecting a lack of
16 virtue and it removes him from the class of individuals --

17 THE COURT: If the issue of being entitled to
18 exercise a constitutional right was left only to the virtuous,
19 we might not have a lot of people walking around with their
20 constitutional rights preserved.

21 MR. KOOB: Understood, Your Honor, generally, but
22 within the Second Amendment context, the virtuousness test is
23 what the Third Circuit has handed down to us in the Binderup
24 opinion as Your Honor is well aware.

25 At the first stage of the Binderup analysis, we look

1 to whether the crime was serious and the way we determine
2 whether a crime is serious is we look to the historical
3 definition of virtuous. That is where that comes from.

4 THE COURT: And I find it an unusual word to use in
5 this context.

6 MR. KOOB: And as Your Honor pointed out and counsel
7 on the other side pointed out, we have the Binderup opinion
8 and we are stuck with it, for lack of a better word, but we
9 will forge ahead.

10 THE COURT: You haven't checked to see whether
11 there's a microphone straight up to the upstairs here. No?
12 (Indicating)

13 MR. KOOB: Perhaps they'll hear me, Your Honor, but
14 we submit that Mr. Range has not satisfied at least two of the
15 factors involved in stage one of that Binderup analysis. My
16 colleague on the other side discussed the classification as
17 step one, for instance, and focused heavily on the fact that
18 it's a misdemeanor label, but what was ignored was the
19 Holloway opinion in which the focus shifted from the label to
20 the maximum potential penalty which Your Honor raised. Here
21 Mr. Range was convicted at the time of a first degree
22 misdemeanor punishable by up to five years. The same as the
23 Holloway DUI which was found to be a serious punishment and,
24 therefore, a serious crime.

25 Also, as Your Honor mentioned, the cross-jurisdictional

1 nexus is a factor that we believe firmly supports the
2 Government's view.

3 Your Honor asked what the consensus means, and if I
4 may address that, we don't get very much guidance from the
5 Holloway majority opinion, but there is some guidance what it
6 could mean from the dissenting opinion of Judge Fisher.

7 Judge Fisher identifies in his review of the DUI
8 case law, excuse me, the DUI statutes that there are 39
9 jurisdictions, which the parties are under near agreement on
10 39. They say 38, we say at least about 40, but at least 39
11 jurisdictions not only prohibit this conduct of welfare fraud,
12 but also label it felonious. What Judge Fisher says in the
13 dissent in Holloway is that 39 is "a significant majority" and
14 he believes the vast majority would tilt in favor in that
15 case, DUI, in favor of the challengers.

16 Here we respectfully submit that because 39
17 jurisdictions would not only criminalize, but also label them
18 felonies, that the factor of consensus is strong in the
19 Government's favor, but even if the Court were to find the
20 current --

21 THE COURT: Well, let's assume -- I mean, really, a
22 swing of one or two states particularly given the fact that
23 there's a little bit of a comparing of apples and oranges
24 here, I mean it could be that the legislature in State A
25 really cannot be compared with how a legislature in State B

1 does things. To focus on 39 to 40, I mean that's not a very
2 satisfying way to resolve this, do you think?

3 MR. KOOB: Your Honor, my suggestion is if we look
4 at Judge Fisher's opinion and use the significant majority as
5 a standard, that 38/39 satisfies that standard regardless of
6 which way Your Honor decides to adopt whether it's 38 or 39.

7 Significant majority --

8 THE COURT: So consensus then turns into meaning
9 bare majority.

10 MR. KOOB: Not bare majority. That would be 26,
11 Your Honor, and here we have 38, 39.

12 But I would like to address the argument made by my
13 friend on the other side about using specific versus general
14 statutes. To cut out more general fraud statutes would not be
15 consistent with the Binderup opinion. I mean Binderup was
16 evaluating the particular facts, in particular, Mr.
17 Binderup's case, a sexual relationship with a 17-year-old
18 employee. It did not look at specific statutory rape-only
19 statutes. It looked at the facts in that case and then
20 determined which statutes would apply based on the applicable
21 law of the state. It did not say, well, the general statute
22 wouldn't apply because we have more specific facts here. If
23 an individual in a particular state commits welfare fraud, but
24 there is no defining welfare fraud statute, that individual is
25 still subject to the general fraud statute and that in it

1 itself is a determination of the legislature.

2 THE COURT: And then once you get on that
3 trajectory, does that not lead to looking at the dollar amount
4 involved and whether it's de minimis or whether it's a one
5 time action or whether it was if Mr. Range was the architect
6 of some scheme, and then once you start that, looking at the
7 specifics, where does that lead?

8 MR. KOOB: Well, the dividing line, Your Honor, I
9 suggest is really the legislature's intent. What did the
10 legislature intend? We're not looking at what the judge would
11 have done with the case as my colleagues on the other side
12 suggest for Georgia. That is too nuanced and I think that's
13 an unworkable solution for the courts, but what the courts can
14 do is look at what the legislature has decided based on the
15 elements of the offense and based on the particular -- if, in
16 fact, there is a dollar amount, if it's in the statute, that's
17 an easy enough application for the Court to apply, but we're
18 not going to look at prosecutorial judgment in terms of
19 whether to bring a case or not and how judges would perform
20 sentencing in Georgia or other states. We just look at the
21 legislature, the state legislature's decision to enact a
22 particular statute and what the elements of that statute are.
23 It's not a difficult application to simply look at a dollar
24 amount if the state legislature has decided that a crime is
25 more serious based on the amount stolen. And it's

1 particularly relevant here in Pennsylvania.

2 Now, there's an amendment, admittedly, in 2018 and
3 my friends on the other side addressed this. When Mr. Range
4 was convicted in 1995, this statute was a misdemeanor in the
5 first degree punishable by up to five years. We respectfully
6 submit that that is serious on its own as the Holloway Court
7 found with respect to DUI, but if we are trying to glean the
8 legislature's intent, in 2018, the Pennsylvania legislature
9 raised the very crime and the dollar amount that Mr. Range was
10 charged with to a felony, a third-degree felony. And, in
11 fact, if we look at the legislative intent which is what the
12 Holloway decision did in evaluating the seriousness of an
13 offense, this is what Senator -- State Senator Regan had to
14 say at Senate Bill 6 which amended this particular statute 481
15 and raised it to a felony. Senate Bill Number 6 was crafted
16 with two objectives in mind: First, to demonstrate to the
17 taxpayers of Pennsylvania that we value their significant tax
18 contributions and are willing to hold the beneficiaries of
19 those dollars accountable for their actions. Second, and more
20 importantly, to preserve the public assistance for those who
21 are truly in need and deserving of taxpayer-funded benefits of
22 which they depend. Now, State Senator Regan went on to quote
23 some headlines to explain why they are increasing the
24 penalties. He noted, "Pennsylvania has a problem when it
25 comes to welfare fraud. We have all seen the headlines,

1 welfare fraud, 346 guilty in the first six months of 2016."
2 He continued. "Latest charges totaled \$287,000 stolen in PA
3 welfare fraud last month." Finally he noted in an article in
4 June, again, this is June of 2018, "Since the beginning of
5 2017 alone, the Office of Inspector General has charged more
6 than 250 Pennsylvanians with welfare fraud amounting to over
7 \$1.5 million in misused funds."

8 THE COURT: How many articles, scholarly or
9 supposedly scholarly articles, have you read or tried to wade
10 through that talked about the risk of legislative intent?

11 MR. KOOB: A number, Your Honor, and we're trying to
12 glean not only one legislature's intent, but 51 jurisdictions.

13 THE COURT: Yes, that's quite a multiplication of
14 the problem.

15 MR. KOOB: I'm very sensitive to that, Your Honor,
16 but, unfortunately, that's the characterization and the
17 structure we've been given in *Binderup* so I'm trying to work
18 within that framework and I think if we have to perform --

19 THE COURT: And if you've read or had somebody else
20 read and give you a little snippet, you know I'm not a huge
21 fan of legislative intent.

22 MR. KOOB: Your Honor, I appreciate that and share
23 your views. I think when we look at the opinions in *Binderup*
24 and *Holloway*, the legislative intent, and we're trying to
25 glean what a legislature is doing, what 51 legislatures are

1 doing is one way for us to try to --

2 THE COURT: No, I understand that. I'm just giving
3 you a little bit of a speed bump on that.

4 MR. KOOB: Okay, and I appreciate that, Your Honor,
5 however -- so, in addition, I want to address a point made
6 about the Irving opinion. That was not the focus of that
7 case. It was a very different opinion. It didn't deal with a
8 review of the Second Amendment challenge to the context that
9 we're dealing with here. In that case, there was two
10 indictments: One for a particular underlying crime and then a
11 later indictment for a felon in possession that would have --
12 that the individual had not been convicted of at the time of
13 his actual possession and so I think under current Supreme
14 Court case law, that may not have been an appropriate vehicle
15 to bring that charge. But --

16 THE COURT: What I'd like to do, I mean I think that
17 you all, both sides here, have, dare I say, more or less a
18 consensus on the step one analysis and the way they kind of
19 shape out. I'd like to turn and really focus on the
20 Government's burden on step two in Marzzarella's frame,
21 two-step thing, because there's a focus or there's a
22 discussion about the role of the so-called straw purchases and
23 I'd like to ask why the Government thinks that's relevant.

24 MR. KOOB: Thank you, Your Honor. Yes, I would like
25 to address that.

1 Mr. Range makes a lot of hay about the fact that the
2 Government hasn't presented --

3 THE COURT: Are you trying to be clever with straw
4 purchases?

5 MR. KOOB: No. Thank you, Your Honor, I appreciate
6 it, but what Mr. Range is arguing is there aren't specific
7 factors to him at the second stage. The Government hasn't
8 provided any studies that are specific to him -- and a point
9 we refute, Your Honor, and I'll get to, but I want to answer
10 your question first -- or that there aren't specific facts
11 about him that would justify the fit here in applying
12 922(g)(1) to him and, respectfully, what we look for when we
13 apply the fit is, is that fit reasonable? And Range claims,
14 you know, he's 51 and so the studies that's up to 50 shouldn't
15 apply to him. I would note in Holloway, Judge Fisher in his
16 dissent critiqued the district court for asking for too much
17 in terms of fit from studies and applications. So I think the
18 ask of the plaintiff is not really the burden of the
19 Government's here, it's a bit lower. But with respect to the
20 alleged straw purchasing, it shows the irresponsibility and
21 the Government's burden at the second stage is to show that
22 applying 922(g)(1) fits its interests, its interest in keeping
23 firearms out of the hands of people who are not responsible
24 with them. It fits reasonably here and it fits the
25 substantial interests significantly. So Range is

1 irresponsible by twice being denied a firearm. I know there's
2 some argument that he didn't know that he was denied a
3 firearm, but the record is very clear.

4 THE COURT: And why is that not a quintessential
5 fact issue suggesting that if it's important, what are we
6 doing here arguing about summary judgment?

7 MR. KOOB: My response to that, Your Honor, is
8 simply the record is very clear that he admitted at his
9 deposition that he went to the firearms store and was twice
10 rejected. That's clear knowledge that he was not entitled to
11 receive a firearm.

12 THE COURT: But I understand the argument is that
13 the rejection was in the context of saying, Oh,
14 somebody's made a mistake here, the paperwork is wrong.

15 MR. KOOB: That is what he alleges, that there was a
16 supposed mistake, but even assuming that's true --

17 THE COURT: Going back to my issue, isn't it a fact
18 problem?

19 MR. KOOB: No, Your Honor, even assuming that was
20 true, he was denied a firearm twice. If he thinks it's a
21 mistake, there are steps that he can take to address that
22 mistake. The step that he took was having his wife go
23 purchase a firearm and provide it to him. Those facts are not
24 in dispute. And whether that's a specific straw purchase or
25 not, Your Honor does not have to decide, however, the

1 Government believes that those facts specific to Range are
2 emblematic of why the fit here is perfectly reasonable.

3 THE COURT: Okay, but the Government learned in 2020
4 about this activity. That's like 25 years after he was first
5 convicted. Is there never an end? The answer is, according
6 to the Government, no.

7 MR. KOOB: Well, no, Your Honor. We don't know the
8 date of the alleged straw purchase.

9 THE COURT: But you learned about it in 2020, right?

10 MR. KOOB: That's correct. As a member of the civil
11 division, we did learn that, and I'm not a member of the
12 criminal division and can't comment on whether those decisions
13 should or should not be made, but I think as a question of
14 intermediate scrutiny in whether applying 922(g)(1) to a
15 person like Range, and, again, I want to go back and talk
16 about the studies, as well, because I don't think it's
17 specific to Range, but to address his point that it has to be
18 very specific and tailored to him, well, I don't think that's
19 the standard, but if it has to be, the evidence of having his
20 wife purchase firearms when he's an excluded person suggests
21 that he is not a responsible firearm owner and the fit is
22 appropriate here.

23 If we could address the studies, as well, Your
24 Honor?

25 THE COURT: Yes. Yes. By the way, a friendly

1 suggestion would be that when the Government's got "evidence"
2 that's been rejected, you might want to tell the next judge
3 that it's been rejected by the Court, the next higher level.
4 I'm not convinced that you all were completely thorough in
5 pointing out that the two studies were rejected in Binderup.

6 MR. KOOB: And, Your Honor, we did not explicitly
7 acknowledge that, but I think when we talk about fitted, it
8 does have application and we have different underlying crimes.

9 THE COURT: You get my point.

10 MR. KOOB: Understood, Your Honor, and well taken.
11 I do want to address that issue, though. We have two
12 underlying crimes in Binderup that were not at issue here. So
13 I submit just because the studies were rejected in Binderup
14 does not mean they have no application to a welfare fraud
15 conviction like Range. I can understand plaintiff's point
16 that he was not an incarcerated individual, but those are not
17 the only studies that we've relied upon. The Wintemute study
18 is one that did not deal with incarcerated individuals and in
19 that study, Wintemute wrote, "Even handgun purchasers with
20 only one prior misdemeanor conviction and no convictions for
21 offenses involving firearms or violence were nearly five times
22 as likely as those with no prior criminal history to be
23 charged with new offenses involving firearms or violence."
24 That directly applies to Mr. Range. That doesn't mention any
25 incarceration. It's simply one prior misdemeanor conviction,

1 a nonviolent nonfirearm-related offense just like the one Mr.
2 Range had and people like him are five times as likely with no
3 prior history to commit an offense. Congress' decision to
4 apply 922(g)(1) to people like Mr. Range is substantially
5 related to that important Government interest of preventing
6 someone who's not responsible with firearms from gaining
7 access to them. And as I mentioned, we should be careful that
8 we don't impose too specific a standard in the evidence that
9 has to be shown. That's what Judge Fisher has warned that the
10 district court was seeking too much from the Government and
11 "demanding an excessively particularized connection between
12 the evidence offered and Holloway's circumstances." I think
13 that's a big guideline for district courts to follow that it
14 doesn't have to be a perfect fit, it just has to be
15 substantially related to that important interest, and I submit
16 here that it is.

17 Your Honor, I have no further argument on the second
18 point. There's one point I wanted to make clear about the
19 first if I may return to that.

20 THE COURT: Yes.

21 MR. KOOB: There's been some discussion of the
22 Folahtar case. I think it's important to note that although
23 that is a felony case, the Court is very clear that crimes
24 entailing deceit and false statements are outside the bounds
25 of the first step. They do not meet the four factors of the

1 Binderup test. So if we look at Range's underlying crime
2 here, any person who at the time of the application, for
3 instance, by means of a wilfully false statement or
4 misrepresentation or by wilfully failing to disclose a
5 material fact regarding eligibility secures assistance or
6 federal food stamps commits a crime which is defined -- which
7 is punishable as noted in the later subsection. Quite
8 similarly, Folajtar's crimes "under penalty of perjury"
9 submitted tax returns she does not believe to be true and
10 correct as to every material matter. That is -- those are
11 akin to each other. They are fraud crimes involving deceit
12 and theft which as the Folajtar opinion laid out have been
13 considered a serious crime since before the country's founding
14 and at the country's founding.

15 THE COURT: Are there any other constitutional
16 rights that would be implicated by a conviction for this crime
17 or this misdemeanor?

18 MR. KOOB: The voting rights, Your Honor, could
19 certainly be impacted and --

20 THE COURT: That's a state by state issue.

21 MR. KOOB: That is a state by state issue, Your
22 Honor. The states are in charge of --

23 THE COURT: Right. What about something like name
24 changes? Is there a state law about when somebody's permitted
25 to change their name?

1 MR. KOOB: I'm not following the --

2 THE COURT: I'm trying to figure out if there are
3 implications in the exercise of other rights by an individual,
4 by a citizen, by a person that are cut back in some respect
5 because of this kind of a conviction.

6 MR. KOOB: There may be others, Your Honor. Voting
7 rights are the ones that stick out to me.

8 THE COURT: It's not a fair question to talk about
9 the whole panoply of rights.

10 MR. KOOB: But I can appreciate where Your Honor is
11 going and I think the response is like voting rights that are
12 managed at a state level. That's what Congress is trying to
13 do here is they're trying to use what state legislatures, the
14 legislative body closest to people --

15 THE COURT: Running for public office -- this is the
16 litany we go through, by the way, in guilty pleas. Running
17 for public office.

18 MR. KOOB: Yes.

19 THE COURT: Voting rights is a state by state thing.
20 Possessing a firearm is -- at least here is listed.

21 MR. KOOB: Yes.

22 THE COURT: There are a number of rights that are
23 implicated, but none of them are subject to this kind of a
24 challenge that I've seen at least. Maybe voting rights are.

25 MR. KOOB: Yes, voting rights, Your Honor, that's a

1 separate issue and certainly a separate test to evaluate
2 those, but I think that's why we go back to the historical
3 context in the Second Amendment. And if Your Honor has no
4 further questions --

5 THE COURT: We can volley back and forth if you'd
6 like.

7 MR. KOOB: Okay. Thank you, Your Honor.

8 THE COURT: Mr. Gura, anything more?

9 MR. GURA: Yes, Your Honor, just a brief response to
10 a few of these points --

11 THE COURT: Sure.

12 MR. GURA: -- that Your Honor made. This business
13 of the so-called alleged straw purchases, these were not straw
14 purchases. Mr. Range's wife decides to gift him firearms
15 because she knows he likes firearms. Neither of them had any
16 knowledge that he was prohibited from having firearms and the
17 Supreme Court recognized this exact circumstance as being
18 quite common when it decided Rehaif. If these so-called straw
19 purchases were within the statute of limitations, and they are
20 not, but even if this happened sometime in the last five
21 years, the Government could never convict either of the Ranges
22 of anything under Rehaif because there's no way that you can
23 show, in fact, it is not true that they were aware that Mr.
24 Range was prohibited. It is quite common especially -- this
25 is the very thing the Supreme Court was concerned about. You

1 have someone who is -- who pleads without a lawyer to a
2 misdemeanor, receives probation. They have no idea how to
3 interpret Section 922 and all the various permutations and
4 complexity of that. We have lawyers arguing about these
5 things all the time. And so, you know, 922(g) requires
6 knowing violation and the Supreme Court has told us that the
7 Government has to prove that to a jury and there's no way that
8 that's ever going to be here on these facts. This is a
9 gentleman, who I think if you're talking about what happened
10 here with these alleged straw purchases, the central fact of
11 the case is this, the very fact of the lawsuit. What
12 happened? As soon as Mr. Range discovered that he was subject
13 to 922(g), what did he do? He got rid of the only gun he had
14 and he sued because he brought himself into compliance with
15 the law. This is not the act of someone who thumbs his nose
16 at the law and uses his wife to sort of effect an end run
17 around the law. This is the act of a law-abiding person who
18 doesn't want to go to jail, doesn't want to -- you know, there
19 are a lot of people walking around Philadelphia who maybe they
20 don't care so much about 922(g) and they're going to have the
21 guns and, you know, hope they don't get caught and they'll
22 deal with it later, but that's not Mr. Range.

23 THE COURT: They do that in Virginia.

24 MR. GURA: They do it everywhere, unfortunately, but
25 that's not Mr. Range. He got rid of the gun and he sued.

1 That's not someone who's going to commit a firearms violation
2 and, again, what is he going to recidivate with? Another
3 welfare fraud offense? That's not going to happen either.

4 So there's really no step two here and we get
5 summary judgment, Your Honor, simply by prevailing in step one
6 and then turning to the Government and saying, Okay, where
7 is -- now let's carry your burden. And when they don't make a
8 step two showing -- and they've had discovery. They've had,
9 you know, the full panoply of rights that every defendant here
10 has and this is the record we've got and it is what it is and
11 there's no step two showing. So as long as we prevail on step
12 one, this case needs to end, Your Honor, we submit, for
13 summary judgment for Mr. Range.

14 Thanks.

15 THE COURT: Anything more?

16 MR. KOOB: Your Honor, I would only point that the
17 ATF form is very clear on this issue that this is not a bona
18 fide transaction when someone's prohibited from owning a
19 firearm.

20 THE COURT: As it happens, I've actually had a
21 couple of these cases and so I'm familiar with the form and,
22 as I said, it's an interesting aspect of this case that it
23 helps the Court be informed about the importance of the
24 colloquies that we go through every time we focus on a
25 defendant who may be making a certain decision, you know,

1 typically with counsel, of course, about the consequences of a
2 conviction.

3 MR. KOOB: Understood, Your Honor.

4 THE COURT: But I understand what you're talking
5 about with the ATF Form.

6 MR. KOOB: Thank you, Your Honor. We
7 respectfully --

8 THE COURT: But I also point out that the issue
9 about knowledge and straw purchases, it is a fact issue and my
10 reaction to it in the context of today's time together is to
11 point out that it's not really deep in with cross summary
12 judgment motions. If it's an issue about knowledge and
13 intent, then it's problematic. You both have, I think, made a
14 very good argument for this being appropriate for summary
15 judgment purposes.

16 MR. KOOB: And, Your Honor, the Government
17 respectfully submits that you don't need to reach step two,
18 that we're successful at step one and, therefore, the
19 challenge would fall and summary judgment should be granted on
20 behalf of --

21 THE COURT: Yes, I got that.

22 MR. KOOB: Thank you.

23 THE COURT: Anything else from anybody?

24 MR. GURA: No, Your Honor, thanks.

25 MR. KOOB: No, Your Honor.

1 THE COURT: I appreciate being with you all. It was
2 very interesting. It's a very interesting case and my request
3 of you is that you stick around a bit and if the interns that
4 have been listening to this have any questions for you
5 while -- not on the case so much, but just the process of
6 being lawyers and why it's a worthy virtuous pursuit, then I'd
7 appreciate it because I think every time law students get to
8 see lawyers in action, it's a good thing.

9 So have a great holiday, everybody. Thank you very
10 much and stay well.

11 MR. GURA: Thanks.

12 MR. KOOB: Thank you, Your Honor.

13 THE COURT: We're adjourned.

14 (Court adjourned)

15 C E R T I F I C A T E
16

17 I certify that the foregoing is a correct transcript
18 from the record of the proceedings in the above-entitled
19 matter.

20

21 *Kathleen Feldman*

22

23 _____
Kathleen Feldman, CSR, CRR, RPR, CM
24 Official Court Reporter

25

Date: September 30, 2021

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